

1 (1) a first degree A.V. block (atrial ventricular), (2) hypertension with associated
 2 dyspnea (shortness of breath) upon exertion; (3) acute chest tightness with even
 3 minor activity; (4) advanced sleep apnea syndrome two failed sleep tests revealed
 4 that the petitioner was unable to be treated with CPAP; (5) and a chronic open lesion
 5 of the the [sic] right heel with exposure of the calcaneus bone (heel bone) with
 6 associated osteomyelitis.⁵

7 In addition, Holper represents that he previously underwent coronary artery bypass and has been
 8 diagnosed with borderline diabetes due to a high A1C level, which is currently addressed by diet
 9 control.⁶ He contends that his medical needs put him at greater risk of complications from the
 10 COVID-19 virus.

11 Holper acknowledges that Attorney General William Barr recently directed the BOP to
 12 prioritize the use of home confinement for eligible inmates at high risk for severe illness from the
 13 COVID-19 virus.⁷ He claims the BOP takes “forever-and a day” to implement appropriate
 14 policies and procedures for administrative action, but “the federal courts have begun granting
 15 emergency writs ordering prisoners released from federal custody who are at high risk for the
 16 virus.”⁸ Based on Holper’s “lengthy list of medical maladies” and the BOP’s purported
 17 “inability to get off the dime and move with dispatch under ANY circumstances,” he argues that
 18 the “court should feel compelled to immediately issue an emergency writ of habeas corpus
 19 ordering the [BOP] to release the Petitioner from custody and return him to his home.”⁹

20 On May 14, 2020, the District of Minnesota entered an order transferring Holper’s
 21 petition to the District of Nevada.¹⁰ The court noted that a petition for writ of habeas corpus
 22 challenges the legality of the fact or duration of a petitioner’s confinement, and Holper is not

23 ⁵ *Id.* at 2.

24 ⁶ *Id.* at 3.

25 ⁷ *Id.* at 4. *See also* Memo. from Attorney Gen. Barr to BOP Dir. on Prioritization of Home Confinement
 26 as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), available at
https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf (last visited May 28, 2020),
 Memo. from Attorney Gen. Barr to BOP Dir. on Increasing Use of Home Confinement at Institutions
 Most Affected by COVID-19 (April 3, 2020), available at
https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf (last visited May 28,
 2020).

27 ⁸ ECF No. 1.

28 ⁹ *Id.*

¹⁰ ECF No. 4.

1 making such a challenge.¹¹ Instead, he requests relief under 18 U.S.C. § 3582(c), which allows
 2 federal prisoners to move for a reduction in sentence due to a change in circumstances since the
 3 time that the original sentence was imposed.¹² Because “Holper argues that his sentence should
 4 be reduced due to the pandemic and his current medical needs, not because his continued
 5 confinement is unlawful,” the court concluded that his “pleading is more appropriately
 6 characterized as a motion for relief under § 3582(c) rather than a habeas petition.”¹³ The
 7 distinction between habeas and § 3582(c) matters greatly because a habeas petition is properly
 8 filed in the district where a petitioner is confined—and Holper is currently confined within the
 9 District of Minnesota—but a § 3582(c) motion must be filed in the criminal proceedings in the
 10 district where the movant was convicted and sentenced, *i.e.*, Holper’s criminal case in the
 11 District of Nevada.¹⁴ Accordingly, the court transferred Holper’s petition to this district “for
 12 consideration as a motion filed in *United States v. Holper*,” 2:18-cr-00037-JAD-NJK.¹⁵

13 Discussion

14 A sentencing court’s ability to modify or reduce a sentence once imposed is seriously
 15 limited.¹⁶ The compassionate-release provision of 18 U.S.C. § 3582(c)(1)(A)(i), as amended by
 16 the First Step Act of 2018,¹⁷ is an exception to this limitation. It allows the sentencing judge to
 17 reduce a sentence based on “extraordinary and compelling reasons” after the defendant has failed
 18 to get the BOP to bring such a motion on his behalf.¹⁸ The court may entertain an inmate’s
 19 request for compassionate release under § 3582(c)(1)(A)(i) only (1) “after [he] has fully
 20 exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion”

22 ¹¹ *Id.* at 1–2.

23 ¹² *Id.* at 2.

24 ¹³ *Id.*

25 ¹⁴ *Id.*

¹⁵ *Id.*

26 ¹⁶ See *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003) (exploring Federal Rules of Criminal
 27 Procedure 35 and 36); 18 U.S.C. § 3582(c).

28 ¹⁷ The First Step Act of 2018, § 603(b), Pub. L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018).

¹⁸ 18 U.S.C. § 3582(c)(1)(A)(i).

1 on his behalf or (2) after “the lapse of 30 days from the receipt of such a request by the warden
 2 of the defendant’s facility, whichever is earlier.”¹⁹

3 Section 3582(c) states that “[t]he court *may not* modify a term of imprisonment once it
 4 has been imposed,” except under specified conditions.²⁰ For a motion brought under
 5 § 3582(c)(1)(A)(i), those specified conditions include the exhaustion of administrative remedies
 6 or the BOP’s inaction for 30 days.²¹ Thus, the exhaustion requirement is imposed by the express
 7 language of the statute itself; it is not judicially created. As the United States Supreme Court
 8 explained in *Ross v. Blake*, while “judge-made exhaustion doctrines . . . remain amenable to
 9 judge-made exceptions[,] . . . a statutory exhaustion provision stands on different footing. There
 10 Congress sets the rules—and courts have a role in creating exceptions only if Congress wants
 11 them to.”²² Courts may not carve out exceptions that Congress did not provide, even “special
 12 circumstances” ones, because “mandatory exhaustion statutes . . . establish mandatory
 13 exhaustion regimes, foreclosing judicial discretion.”²³

14 Holper makes no allegation or showing that he has exhausted or attempted to exhaust his
 15 administrative remedies with the BOP. Rather, he alleges that the BOP is completely unable to
 16 move as fast as he would like. Given Congress’s decision to mandate exhaustion and specify
 17 this singular, express exception, this court cannot overlook Holper’s apparent failure to
 18 exhaust.²⁴ Because Holper did not exhaust the administrative process before filing his request

19 ¹⁹ *Id.*

20 ²⁰ 18 U.S.C. § 3582(c) (emphasis added).

21 ²¹ 18 U.S.C. § 3582(c)(1)(A).

22 ²² *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016); *see also Shaw v. Bank of Am. Corp.*, 946 F.3d 533, 541 (9th Cir. 2019) (“[I]f exhaustion ‘is a statutorily specified prerequisite’—as opposed to a judicially created one—‘[t]he requirement is . . . something more than simply a codification of the judicially developed doctrine of exhaustion, and may not be dispensed with merely by a judicial conclusion of futility.’” (quoting *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975))).

23 ²³ *Id.* at 1856–58.

24 ²⁴ *See Ross*, 136 S. Ct. at 1856, 1862 (concluding that the Prison Litigation Reform Act’s “mandatory language means a court may not excuse a failure to exhaust, even to take [special] circumstances into account”). There are also sound policy reasons to require an inmate to present his COVID-19 compassionate-release request first to the BOP. The Attorney General has empowered the BOP to transfer suitable candidates with COVID-19 risk factors to home confinement. *See, supra*, n.7. The exhaustion doctrine recognizes “that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer” and allows the agencies to apply their “special

1 for compassionate release, it must be denied for failure to exhaust. If Holper intends to seek
2 such relief again after exhausting the BOP's administrative process, he should file his request as
3 a motion in his criminal case (*United States v. Holper*, 2:18-cr-00037-JAD-NJK).²⁵

4 **Conclusion**

5 IT IS THEREFORE ORDERED that Petitioner Steven Holper's Petition for Writ of
6 Habeas Corpus / Motion for Compassionate Release [ECF No.1] is DENIED, and this habeas
7 action is DISMISSED without prejudice for lack of exhaustion.

8 IT IS FURTHER ORDERED that the Clerk of Court is directed to:

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- 10 • FILE a copy of the petition [ECF No. 1] and this order in Holper's criminal case:
United States v. Holper, 2:18-cr-00037-JAD-NJK;
- 11 • ENTER FINAL JUDGMENT accordingly, dismissing this habeas action without
prejudice; and
- 12 • CLOSE THIS CASE.

13 Dated: June 3, 2020

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U.S. District Judge Jennifer A. Dorsey

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25 expertise." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), superseded by statute on other grounds.
26 "Because defendant is in BOP custody, the BOP is in a better position to initially determine [his] medical
27 needs, the specific risk of COVID-19 to [him] and the inmates generally at" his facility, "the risk to the
public if [he] is released[,] and whether [his] release plan is adequate." *United States v. Read-Forbes*,
2020 WL 1888856, at *4 (D. Kan. Apr. 16, 2020).

28 ²⁵ The court takes no position in this order about the potential success or merit of such a motion.